Nilai-3 Porcelain Inn Sdn Bhd v Berjaya Sompo Insurance Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-2054 OF 2010
HASNAH HASHIM J
7 SEPTEMBER 2012

Evidence — Expert evidence — Opinion based on reports — Cause of fire — Opinion of expert — Conflicting evidence of PW4 and DW2 — PW4 and his team were at scene of fire on same day of fire — DW2 did not conduct fire investigation on day of fire — Samples collected kept for a couple of days before sending to chemist — Which of two expert opinion credible and inherently probable — Conflicting versions tested based on oral evidence against contemporaneous documents and overall circumstances material to the issue

Insurance — Policy — Fire insurance — Claim on policy — Plaintiff's stocks and equipment damaged by fire — Claim rejected by defendant — Whether fire caused by short circuit of electrical wiring — Allegation that traces of kerosene found in the premise — Whether fire caused by deliberate act of plaintiff — Whether established

The plaintiff's claim against the defendant was pursuant to a fire insurance cover in respect of the plaintiff's stock in trade, office equipment and furniture at their place of business in Nilai Industrial Park. As a result of a fire at the plaintiff's premises, the plaintiff's stocks and equipment were badly damaged. According to the Fire Department's report, the cause of fire was as a result of a short circuit of electrical wiring. The plaintiff's claim against the defendant was pursuant to the policy but it was rejected by the defendant. The defendant alleged that the fire was caused by the deliberate act of the plaintiff as traces of kerosene were found in the premise. The plaintiff denied the defendant's allegations, hence, this action by the plaintiff against the defendant. PW4, the lead investigator, concluded in his report that the fire was caused by electrical malfunction or short circuit. DW2 who also conducted an investigation of the fire, concluded that there was evidence, to suggest the fire was deliberate because traces of kerosene was present at various locations in the premises. Hence, the issue before the court was whether the fire was caused by the short circuit of the electrical wiring or a deliberate act of arson.

Held, allowing the plaintiff's claim with costs:

(1) Even though PW4 may only have seven years of experience, this court was satisfied that he possesses the necessary skills. PW4 had conducted the investigation objectively, diligently and thoroughly. His team of

investigators was at the scene of the fire immediately upon notification on the same day of the fire. DW2 did not conduct the fire investigation on the day of the fire and had kept the samples she collected for a couple of days. She also admitted that she did not examine the electrical wiring. Her investigation seemed to be limited to the deliberate cause of fire. The emphasis of her investigation was on the traces of kerosene found on the floor. PW4 however conducted the investigation with the purpose of determining the cause of fire whether deliberate or not (see para 36).

(2) PW4 had explained clearly and in detail how the investigation was conducted. The investigation was not flawed due to the failure to comply or follow strictly the steps as set out in the National Fire Protection Association ('NFPA'). DW3, the defendant's chemist confirmed in his report that there was evaporated kerosene in the samples but did not give evidence whether the fire was caused by the kerosene present in the samples. Furthermore, DW2 admitted in evidence that she did not examine the fluorescent lights and wiring and was therefore unable to conclusively rule out that an electric short circuit as a possible cause of fire (see paras 40–43).

(3) The contention that the plaintiff deliberately caused the fire because their business was not doing well was mere speculation on the part of the defendant. Hence, based on the evidence adduced, the defendant had failed to discharge the burden of proving that the fire was deliberately started by PW1 (see para 46).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah berikutan perlindungan insurans kebakaran bagi stok dagangan, peralatan-peralatan pejabat dan perabot plaintif di premis perniagaannya di Nilai Industrial Park. Akibat daripada kebakaran di premis plaintif, stok-stok dan peralatan-peralatan plaintif telah rosak teruk. Menurut laporan Jabatan Bomba, punca kebakaran adalah akibat litar pintas pendawaian elektrik. Tuntutan plaintif terhadap defendan adalah berdasarkan polisi tersebut tetapi ini ditolak oleh defendan. Defendan mendakwa bahawa kebakaran tersebut telah disebabkan oleh perbuatan sengaja plaintif kerana kesan minyak tanah ditemui di dalam premis. Plaintif menafikan dakwaan defendan, dengan itu, tindakan ini oleh plaintif terhadap defendan. PW4, penyiasat utama, membuat kesimpulan dalam laporannya bahawa kebakaran tersebut disebabkan oleh kerosakan elektrik atau litar pintas. DW2 yang juga menjalankan siasatan bagi kebakaran tersebut, membuat kesimpulan bahawa terdapat bukti, untuk mencadangkan bahawa kebakaran tersebut disengajakan kerana terdapat kesan minyak tanah di pelbagai lokasi premis tersebut. Oleh itu, isu di hadapan mahkamah adalah sama ada kebakaran tersebut disebabkan

oleh litar pintas daripada pendawaian elektrik atau perbuatan membakar yang disengajakan. A

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Walaupun PW4 hanya mempunyai pengalaman selama tujuh tahun, mahkamah berpuas hati bahawa dia mempunyai kemahiran yang diperlukan. PW4 telah menjalankan siasatan secara objektif, tekun dan teliti. Pasukan penyiasatnya berada di tempat kejadian kebakaran sejurus selepas pemberitahuan pada hari yang sama berlakunya kebakaran tersebut. DW2 tidak menjalankan siasatan pada hari kebakaran tersebut dan telah menyimpan sampel yang diambilnya selama beberapa hari. Dia juga mengaku bahawa dia tidak memeriksa pendawaian elektrik. Siasatannya seolah-olah terhad kepada punca kebakaran yang disengajakan. Penekanan penyiasatan adalah pada kesan minyak tanah yang ditemui di atas lantai. Walau bagaimanapun PW4 telah menjalankan siasatan dengan tujuan untuk menentukan punca kebakaran sama ada sengaja atau tidak (lihat perenggan 36). B C D

(2) PW4 telah menerangkan dengan jelas dan terperinci tentang bagaimana siasatan tersebut dijalankan. Siasatan tersebut tidak cacat kerana kegagalan untuk mematuhi atau mengikuti langkah-langkah seperti yang dinyatakan dalam Persatuan Perlindungan Kebakaran Kebangsaan ('PPKK'). DW3, ahli kimia defendan mengesahkan dalam laporannya bahawa terdapat minyak tanah yang telah tersejat dalam sampel tetapi tidak memberi keterangan sama ada kebakaran tersebut disebabkan oleh minyak tanah dalam sampel. Tambahan lagi, DW2 mengaku dalam keterangannya bahawa dia tidak memeriksa lampu neon dan pendawaian dan oleh itu tidak dapat menyimpulkan dengan pasti bahawa litar pintas elektrik merupakan kemungkinan sebab berlakunya kebakaran (lihat perenggan 40–43). E F G

(3) Hujahan bahawa plaintif dengan sengaja menyebabkan kebakaran tersebut kerana perniagaan mereka tidak berjalan dengan baik adalah spekulasi semata-mata di pihak defendan. Oleh itu, berdasarkan keterangan yang dikemukakan, defendan gagal melepaskan beban membuktikan bahawa kebakaran tersebut telah dimulakan dengan sengaja oleh PW1 (lihat perenggan 46).] H

Notes I

For a case on opinion based on reports, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1836.

For cases on claim on policy, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 121–128.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (folld)

Muniandy & Ors v PP [1966] 1 MLJ 257; [1966] 1 LNS 110, FC (folld)

PP v Muhamed bin Sulaiman [1982] 2 MLJ 320; [1982] CLJ 292 (Rep); [1982] CLJ 540, FC (refd)

R v Silverlock [1894] 2 QB 766, CCR (refd)

Sim Ah Oh v PP [1962] 1 MLJ 42; [1961] 1 LNS 124 (folld)

Sim Ah Song & Anor v Rex [1951] 1 MLJ 150; [1951] 1 LNS 83 (folld)

Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd [1998] 3 MLJ 724; [1998] 1 CLJ 916, HC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85, CA (refd)

Sabrina Richards (T Susielan, S Chrishanthini and Veerasundar with her) (Hakem Arabi & Associates) for the plaintiff/respondent.

Satharueben (Murali, Hema and Ranjini Anndy with him) (Satha & Co) for the defendant/appellant.

Hasnah Hashim J:

BRIEF BACKGROUND

[1] The plaintiff's claim against the defendant is pursuant to a fire policy dated 8 August 2006. By a fire insurance policy, the defendant issued to the plaintiff and the plaintiff accepted the fire insurance cover in respect of the plaintiff's stock in trade, office equipment and furniture at the plaintiff's place of business located at the Nilai Industrial Park. The total sum insured was RM365,000 in respect of the said stock in trade consisting of handicraft products, artificial flowers, souvenirs, wedding accessories. The period of insurance was from 31 May 2005–30 May 2007.

[2] A fire occurred at the plaintiff's premises on 8 February 2007 at about 2.30am. As a result of the fire the plaintiff's stocks, equipment were badly damaged. The loss was estimated to be about RM424,000.

[3] According to the *Jabatan Bomba* (Fire Department) report dated 6 March 2007 the cause of fire was as a result of a short circuit of electrical wiring. The plaintiff then lodged a claim against the defendant pursuant to the policy for the total amount of RM363,000 but it was rejected by the defendant.

The defendant alleged that the fire was caused by the deliberate act by the plaintiff as traces of kerosene were found in the premise. The plaintiff denied the defendant's allegations, thus the plaintiff lodged this action against the defendant.

[4] This issue can be dealt with by evaluating the conflicting evidences of 'PW3', and 'DW3' (appointed by insurers) in the light of other evidences. This will determine the result of this suit. From the evidence adduced in the trial, the crucial issue of fact is whether the fire was caused by the short circuit of the electrical wiring or a deliberate act of arson.

PW4'S EVIDENCE

[5] 'PW4', Faizal Ahmad, *Pegawai Bomba Kanan II* lead the investigation as the 'Ketua Pasukan Penyiasat Kebakaran' of the *Jabatan Bomba*. He holds a Diploma in Mechanical Electronics from Pusat Latihan Teknologi Tinggi Batu Pahat and at the time of giving evidence he has served seven years with the *Jabatan Bomba*. PW4 has attended courses on fire investigation organised by the Akademi Jabatan Bomba dan Penyelamat in Marang Terengganu. He has attended more than 200 courses at the said academy and to date has conducted more than 200 fire investigations. PW4 is the plaintiff's expert witness and conducted the investigation together with the assistance two other fire officers on the same day of the fire. He arrived at the scene at about 4.45pm.

[6] In carrying out the investigation he referred to the *Guide for Fire and Explosion Investigations* 2004 Edition (NFPA 921) (P27). The guideline is used by the *Jabatan Bomba* for the purposes of fire investigation.

[7] PW3 prepared the *Laporan Penyiasatan Kebakaran* (P26). In the report he explained the modes of conducting the investigation. In para 6.2 of the report he explained that there were evidence that as to the cause of fire. The first proof according to PW4 was the fire signs:

> Daripada tanda kebakaran (fire signs) punca dapat dikenalpasti dari pendawaian elektrik pada lampu kalimatang di bahagian belakang premis.

[8] PW4 in his evidence states that the origin of the fire was at the back of the premises as he had explained on p 4 of P26. He explained that:

> Kesan kebakaran menunjukkan terdapat bentuk V shape oxidation dan spalling.

[9] The V-shape oxidation occurred as a result of intense heat. The racks also turned bright red as a result of the intense heat of the fire (*gambar* 4, p 7 P26). With regards to the sapling PW4 explained that:

A

> Kesan spalling menunjukkan pecahan kepada dinding, simen terkopak atau tanggal … di kawasan yang sama di belakang.

[10] PW4 also carried out excavation at the affected area:

B

> Pihak kami menjalan excavation iaitu pemugaran di kawasan yang terjejas akibat kebakaran tersebut. Hasil pemugaran kami menjumpai kesan metal mark iaitu wayar yang mengembang akibat letupan atau spark akibat berlakunya litar pintas.

C

[11] In his report he also pointed out that the electrical wiring of the fluorescent lights did not used a functional conduit which would have prevented a short circuit:

> Masa siasatan saya memeriksa pendawaian letrik di kawasan tersebut dan mendapati pendawaian letrik pada lampu tidak mengikuti spesifikasi yang standard kerana saya dapati adanya penyambung wayar yang tidak gunakan *connector*.

D

> Di dalam satu litar sekirannya wayar tidak dilakukan dengan betul berlakunya arus elektrik yang tinggi dia akan menjadi satu letupan sparkling akan jatuh ke bawah ke kertas atau plastik akan jadi sumber nyalaan. Tujuan pemugaran adalah untuk menentukan punca nyalaan. Pasukan kami mengunakan scop dan kita membalikkan kertas yang ada di atas … metal mark timpa ke atas … dia macam simen tetapi kecil untuk gali kertas.

E

F

[12] During cross-examination learned counsel for the defendant asked PW4 why he did not take photographs of the of the connector as required by the NFPA 921 guidelines PW4 explained:

> Jabatan Bomba sediakan garis panduan untuk pegawai siasatan sesuatu kebakaran dan NFPA digunakan sebagai rujukan dan pegawai siasatan tidak terikat sepenuhnya.

G

[13] Learned counsel defendant also asked in cross-examination whether the short circuit occurred if the fire had started from the floor. PW4 responded that it was not possible:

H

> Tidak kerana semasa siasatan dijalankan saya memeriksa keseluruhan wayar letrik cair dan didapati banyak penyambung wayar tidak gunakan *connector* dan ini boleh menyebabkan mudahnya berlaku litar pintas.

I

[14] The photograph (*gambar* 1) shows the fluorescent lights with a dangling electrical wiring. *Gambar* 3 shows that the pattern of the fire was in the form of 'V'. The Fire Department visited and carried out the investigation immediately after the occurrence of the fire. In the report it is stated in para 6.2.22 that there was no smell or evidence of petrol or kerosene. In cross-examination PW4

agreed that there was a strong smell but the smell was that of burnt plastic and paper. He went on further to explained during cross-examination that:

> Kiranya terdapat kesan minyak ianya akan keluar bau yang sangat unik sukar untuk jelaskan … Tidak biasa tidak ada bau … bila kena air ianya akan berminyak macam pelangi.

[15] This is also supported by the evidence of PW3, Ghazali Maulud who is the *Pegawai Bomba Kanan II* and headed the operation to stop the fire:

> Setelah menyiasat kawasan kebakaran didapati tidak terdapat punca-punca lain terutamanya bahan yang mudah terbakar (*flammable liquid*) or gas, putting rokok (*cigarette butts*) dan pelbagai kebakaran (*multiple seats of fire*).

[16] PW3 also gave evidence that there was no evidence of smell of kerosene:

> Tidak ada tanda minyak tanah (*kerosene*) mahupun bau minyak tanah (*kerosene*).

[17] PW4 concluded in the report that the fire was caused by electrical wiring:

> Kebakaran tersebut adalah disebabkan dan penyambungan wayar yang tidak mengikut spesifikasi yang ditetapkan dimana wayar yang disambung tidak menggunakan *connector* yang boleh menyebabkan terjadi *loose connection* dan berlaku litar pintas.

DW2'S EVIDENCE

[18] The credential of 'DW2' is quite impressive. Apart from her professional qualifications, she had testified in many court cases in Malaysia, and in the Philippines and her expert evidence have been accepted by the courts.

[19] From her report and her evidence in court, she made certain observations and conclusion. Just like PW4 she had conducted an investigation of the fire. DW2 conducted the investigation on 9 February 2007. A detailed physical examination of the premises was carried out and collected samples from various locations in the fire affected premises. The samples were all sent to the laboratory for analysis. DW2 collected the fire debris from the fire scene on 9 February 2007. Two samples were collected on 10 February 2007. The locations where she collected is shown in the drawings in her report (P2; p 263 B). Fire debris also referred collected from the fire scene. Samples collected by DW2 included burnt remains and samples collected outside the burnt area were remains were not burnt.

[20] The fire occurred during working hours. DW2 concluded that there was evidence, to suggest the fire was deliberate:

> The overall evidence gathered indicated that the fire had been intentionally set by someone with keys to the premises.

[21] DW2 also states in evidence that kerosene was detected at multiple locations, five within the severely burnt area and four in the unburnt areas. She went on to say that electrical malfunction or short circuit could not account for the presence of kerosene at various locations in the premises was well as the unusual widespread and severe low level burning observed:

> In theory, it was possible for an electrical malfunction of a fluorescent light or a short circuit at the live wiring installation to ignite a fire, However electrical malfunction or short circuit could not account for the presence of kerosene at various locations in the premises ….

[22] DW2 had interviewed 'PW1' and four workers form the neighboring premises.

EXPERT EVIDENCE

[23] This court is now faced with the task of having to choose which expert to believe. In discharging this task, I am guided by the following cases:

Adams J in *Sim Ah Oh v Public Prosecutor* [1962] 1 MLJ 42 at p 42; [1961] 1 LNS 124 held:

> The evidence of the expert must be tested like any other evidence against the facts upon he is disposing. The expert should have been asked by the prosecutor to elaborate and give his reasons as to why he said these odd pieces of paper were in fact documents relating to public lottery, and the learned President should have considered these reasons before he came to his finding.

[24] Brown AG CJ in *Sim Ah Song & Anor v Rex* [1951] 1 MLJ 150 at p 151; [1951] 1 LNS 83 said:

> The responsibility for the determination of this question, as in the case of every question upon which expert evidence is called, rested upon the court and not upon the expert. The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to

determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

[25] Gopal Sri Ram JCA in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 115; [2003] 2 CLJ 19 at p 25 said:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

[26] In *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257; [1966] 1 LNS 110, the trial judge accepted the evidence of certain witnesses because they had remained unshaken in cross examination. Based on that evidence he convicted the appellant. The Federal Court reversed the decision. Ong Hock Thye FJ said:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

[27] I have no hesitation in accepting both PW4 and DW2 as experts in the field of investigating cause of fire. I shall now look at the conflicting evidence of these two experts.

[28] Both PW4 and DW2 are armed with knowledge and experience in fire investigation. PW4 has investigated more than 200 cases and DW2 have testified as expert and her evidence as an expert have been accepted by the courts. I am of the view that both PW4 and DW2 are both experts and their evidence can be considered and accepted by this court.

[29] When the court is required to decide which among conflicting versions the correct approach would be to test the versions based on oral evidence against the contemporaneous documents and overall circumstances material to the issue. The version more consistent with these ought to be accepted as being more credible and inherently probable. In *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 at p 439; [2000] 4 CLJ 324 it was held:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact … He should after accepting the respondent's evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the respondent's oral testimony.

[30] In *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 the court held:

> It is the duty of the court to satisfy itself that the expert is indeed an expert specially qualified, armed with the necessary skill and experience and has a vast knowledge in the field of enquiry earned out by him. The court would also want to know the duration at time the expert has engaged himself in his field of expertise and whether that is his only occupation and in which court he has testified. Generally, the court is interested to know the expert's background. The purpose is simply to show the competency of the expert.

[31] When the court treats a witness as an expert, it must ensure that he or she complies with certain requirements which in the words of Suffian LP in *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320 at p 332; [1982] CLJ 292 (Rep); [1982] CLJ 540 are as follows:

> As to the question whether or not PW2 is an expert, it is true that this is a preliminary question to be determined, but it is a question upon which, in practice, considerable laxity prevails. This is because while the expert must be 'skilled', he need not be so by special study, he may be so by experience; and the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

[32] In *R v Silverlock* [1894] 2 QB 766, the identity of handwriting was in question and a solicitor was called to give evidence on it, and Lord Russell CJ said at p 771:

> It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?

[33] Phipson on *Evidence*, (11th Ed), in para 1285 where it is stated that:

> The competency of the expert is a preliminary question for the judge and is one upon which, in practice considerable laxity prevails. Though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

[34] The case of *R v Silverlock* [1894] 2 QB 766 as authority for the above proposition by the author.

[35] The author after saying that the opinions of medical men are admissible upon questions remarked that even the evidence of unqualified medical practitioners, hospital students and dressers is admissible in appropriate circumstances.

[36] Even though PW4 may only have seven years experience I am satisfied that he possesses the necessary skills and I have no hesitation accepted his evidence. PW4 had conducted the investigation objectively, diligently and thoroughly. His team of investigators were at the scene of the fire immediately upon notification on the same day of the fire. DW2 did not conduct the fire investigation on the day of the fire and had kept the samples she collected for a couple of days. She also admitted that she did not examined the electrical wiring. Her of investigation seemed to be limited to the deliberate cause of fire. The emphasis of her investigation was on the traces of kerosene found on the floor. PW4 however conducted the investigation with the purpose of determine the cause of fire whether deliberate or not.

NATIONAL FIRE PROTECTION ASSOCIATION 921 (NFPA 921)

[37] The NFPA 921 is a guide for fire and explosion investigations published by the American National Fire Protection Association. Its purpose is to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents (s 1.2.1).

[38] Therefore the NFPA serves only as a guideline for the fire officers to follow and is not a circular or any other form of legislation. The members of the *Jabatan Bomba* need not comply with all the requirements as set out in NFPA as explained by PW4.

[39] Chapter 4 of the NFPA described the basic methodology in fire investigations. The systematic approach recommended is the scientific approach, that is:

(a) collect data;

(b) analyst the data collected;

(c) develop a hypothesis;

(d) test the hypothesis; and

(e) select the final hypothesis.

[40] With regards to the conduct of the investigation the NFPA states in para 4.4.3 that the actual investigation may take and include different steps and procedures which is determine by the purpose of the investigation. PW4 had explained clearly and in detailed how the investigation was conducted during examination-in-chief and also cross-examination. Therefore PW4 need not follow precisely the procedures as set out in NFPA. In other words the investigation conducted by PW4 is not flawed if he did not comply or follow strictly the steps as set out in the NFPA.

[41] PW4 together with his team and conducted the investigation ion the same day of the occurrence of fire. DW2 conducted the investigation a day after the fire ie 9 February 2007. In her evidence she said that she had detected kerosene at multiple locations. PW4 and PW3 both were at the scene immediately could not trace any smell of kerosene. According to DW2 this is because the smell could easily be overwhelmed by the smoke and the glass remaining after the fire especially after the fire has been extinguished and the doors and shutters of the premises have been closed. However, as explained by PW4 if there had been traces of kerosene there would have been a distinctive smell. The defendant's chemist ('DW3') analysed the samples and confirmed in his report that there were evaporated kerosene in the samples but did not give evidence whether the fire was caused by the kerosene present in the samples. He admitted during cross-examination that the tests he ran on the samples did not show whether the alleged kerosene detected was involved in the fire and that the tests he conducted merely detected the presence of kerosene and not the quantity:

> The machine won't tell if it is kerosene …;
>
> I can't say which had more but the samples had kerosene ….

[42] DW2 also admitted in evidence that though she collected the samples on 9 February 2007 and 10 February 2007 the samples were only given to the chemist for examination on 12 February 2007–13 February 2007. The reason for the delay was because it was the weekend and a public holiday.

[43] Furthermore DW2 admitted in evidence that should did not examined the fluorescent lights and wiring and was therefore unable to conclusively ruled out that an electric short circuit as a possible cause of fire.

DELIBERATE ACT BY THE PLAINTIFF

[44] The defendant failed to adduce any evidence of any deliberate act by the plaintiff to start the fire. PW1 in his examination-in-chief stated that he kept the premises with his workers at about 7.30pm and was at his girlfriend's house on or around 8.15pm and left the house the following morning. This was confirmed by his girlfriend, PW2 and Low Kwee Choo.

[45] PW1 was not the only person holding the keys to the premises as alleged by the defendant. The plaintiff's accounts clerk and PW1 will hold the keys to the premises and either one of them will open Unit 31 for business. All keys are kept in the drawer near the cash register and all workers have access to the keys. As stated during cross-examination DW2 only interviewed the worker for bouring shops and did not interview the plaintiff's workers to confirm who kept the keys to the premises.

[46] It is the contention of the defendant that the plaintiff had deliberately caused the fire as it was in dire financial state. However, PW1 in evidence had stated that there was income from the business and that they were able to settle most of their invoices. The contention that PW4 deliberately caused the fire because his business was not doing well is just mere speculation on the part of the defendant.

[47] On the issue of the applicable standard of proof, the Federal Court in the case of *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1, held as follows:

> It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities …

[48] In the same case the Federal Court quoted Wedford and Otter-Harry's work on *Fire Insurance* (3rd Ed), p 256 reasoned thus:

> If the property is actually burned, the loss is in fact caused by fire and the policy therefore covers it unless the insurers succeed in establishing that the fire was originated by an excepted cause. Where the result of the evidence is to leave the cause of the fire in doubt, the insurers have not discharged the onus of proof and the assured therefore will succeed. Further, if the insurers rely on the defence of arson by or with the privity of the assured, the charge, being in effect a criminal charge, must

be strictly proved. Hence, where the evidence leaves it open whether the loss was caused by accidental fire or arson, the assured must recover since the presumption against crime operates in his favour.

[49] In the case of *Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd* [1998] 3 MLJ 724; [1998] 1 CLJ 916, His Lordship Vincent Ng J quoted with approval a passage by Raoul Colinvaux in the *Law of Insurance*:

> One of the consequences of the principles that a contract of insurance is one of the utmost good faith (see *Heyman v Darwins Ltd* [1942] AC 356 at p 365) is that fraudulent claims made under it give the insurers the right to avoid (see *Stebbing's case* [1917] 2 KB 433 at p 438) the whole policy. Thus, if the assured makes a fraudulent claim, he cannot recover at all (see *Norton v Royal* [1885] 1 TLR 460), and conditions in the policy to this effect (see *Jureidini v National British* [1915] AC 499) are declaratory of the legal position without them.
>
> A statement made by the assured is fraudulent if he knows it to be false and makes it in order that the insurers may act upon it. The most common examples are claim by an assured who has himself destroyed the property insured, or grossly exaggerated claims. Mere exaggerations, however, is not conclusive evidence of fraud (see *London Assurance v Clare* [1937] 57 LI LR 254 at p 268), for value is often a matter of opinion and though such exaggeration will amount to fraud if it is dishonestly made, or so greatly in excess of the true amount as to be incompatible with good faith (see *Chapman v Pole* [1870] 22 LT 306).

[50] In the instant on the evidence I am of the view that the defendant has failed to discharge the burden of proving that the fire was deliberately started by PW1.

CONCLUSION

[51] Based on the above reason the plaintiff have succeeded on a balance of probabilities in proving its claim against the defendant. Thus the plaintiff's claim is allowed with costs.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed